In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 382

ROBERT HAMMOND AND ROBERT LEWIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. A; R. 18a)[1] is reported at 360 F. 2d 688. A per curiam opinion denying a petition for rehearing (Pet. App. F) is not yet reported.

---

[1] The record in this Court consists of the Appendix to the appellant's brief in the court below, supplemented by papers involving proceedings in that court. We are lodging herewith the transcript of trial proceedings.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1966 (R. 20a). A petition for rehearing was denied on June 27, 1966 (Pet. App. D, E, F). The petition for a writ of certiorari was filed on July 23, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' convictions must be reversed because of delay in arrest after the commission of a narcotics offense.

2. Whether petitioners have been denied a fair trial because the government did not call as a witness the informer who introduced a buyer of narcotics to petitioners and who was present on the occasion of a sale.

3. Whether the trial court erred in declining to order the production of a statement made by one of the defendants to a government attorney.

4. Whether there was error in the court's instructions to the jury.

STATEMENT

After a trial by jury in the United States District Court for the Southern District of New York, petitioner Hammond was convicted under one count, and petitioner Lewis under two counts, of an indictment charging narcotics sales in violation of 21 U.S.C. 173, 174. Each of the petitioners was sentenced to im-

prisonment for five years. The court of appeals affirmed, per curiam, in open court.

Agent Scott of the Federal Bureau of Narcotics testified that on the evening of August 6, 1963, while working in an undercover capacity, he was introduced to petitioners by an informant on the streets of Manhattan where, after negotiations, he delivered money to the petitioner Lewis and received heroin from the petitioner Hammond (Tr. 14-20). A second agent, Richard Holborow, observed the entire transaction (Tr. 109-112).

Thereafter, on the evening of August 21, 1963, Agent Scott again met petitioner Lewis on the street and purchased additional heroin which Lewis delivered inside the lobby of a building (Tr. 22-24). The movements of the two participants on this occasion were observed by Agent Holborow (Tr. 116-117).

Petitioners were arrested on November 24, 1964. At trial, objection by defense counsel to a question by government counsel as to why petitioners were arrested on that date was sustained (Tr. 144).

ARGUMENT

1. The court below properly held that, in the circumstances of this case, the fifteen-month delay between the commission of the offenses and the arrest of petitioners was not a denial of due process. There was no showing that the delay was prejudicial or purposely oppressive. See *United States* v. *Wilson*, 342 F. 2d 782 (C.A. 2), certiorari denied, 382 U.S. 860; *Carlo* v. *United States*, 286 F. 2d 841 (C.A. 2),

certiorari denied, 366 U.S. 944. Petitioners are hardly in a position to argue that prejudice may be "presumed" from a delay which they prevented the government from explaining at trial.

The holding below is not in conflict with the holding of the Court of Appeals for the District of Columbia in *Ross* v. *United States*, 349 F. 2d 210. In *Ross* the court was concerned with the peculiar circumstances of the defendant and his plausible claim of inability to recall events of the day of the offense, in view of the fact that his conviction rested solely upon the uncorroborated testimony of an undercover agent who himself was able to reconstruct events only with the held of notes. See 349 F. 2d at 213-216. Here, the detailed testimony of the agent, Scott (See Tr. 50-59, 68-73, 79), was corroborated by that of Agent Holborow as to time, place, circumstance and positive identification of petitioners (Tr. 109-117). Since *Ross*, the District of Columbia Circuit has made it clear that the question of whether a prosecution is barred because of delay in arrest after commission of the offense turns on the particular facts of each case. See, *e.g.*, *Powell* v. *United States*, 352 F. 2d 705, 709 (C.A.D.C.); *Jackson* v. *United States*, 351 F. 2d 821 (C.A.D.C.).

2. This case does not involve the failure of the government to disclose the identity of an informer (as in *Roviaro* v. *United States*, 353 U.S. 53), or the suppression by the government of evidence favorable to the defense (as in *Brady* v. *Maryland*, 373 U.S. 83). The government furnished the defense with the

name and last known address of the informer who introduced the undercover agent to petitioners on the occasion of the first sale (Tr. 96). The government was under no further duty either to produce the informer or to call him as its witness. See *United States* v. *Cimino*, 321 F. 2d 509 (C.A. 2), certiorari denied, 375 U.S. 974. On this record there is no reason to suppose that the informer's testimony would have been other than merely cumulative. Nor does the record suggest that the informer was any more available to the government than to the defense. The petitioner Hammond admitted that he knew the informer by name and had seen him in the neighborhood (Tr. 163).

3. The district court did not err in refusing to order the government to produce the question-and-answer statement of petitioner Hammond, made to a United States Attorney at the time of his arrest. The motion for production was made orally in the middle of the trial. Defense counsel, when pressed for a cause, answered only that it was vital to the defense in view of the delayed arrest (See Tr. 92-94). The motion was not renewed when government counsel used the statement to impeach petitioner Hammond on cross-examination (see Tr. 171-175). The Jencks Act (18 U.S.C. 3500) was, of course, wholly inapplicable; and no suppression of evidence is involved so that *Brady* v. *Maryland*, 373 U.S. 83, cited by petitioner (Pet. 8-9), has no relevance here.

4. The court, in charging that "the delay by law-enforcement officers in arresting a defendant is not to be considered by you" (R. 15a), was obviously

telling the jury only that the legality of the delayed arrest was not a question for the jury to determine. The jury could not reasonably have understood from the charge that it was precluded from considering the time lapse, together with all other relevant factors, in weighing the credibility or appraising the memory of the witnesses—a matter as to which it was fully instructed by the court (see Tr. 218-222, 228a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

SEPTEMBER 1966.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 230570 186